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In The

Supreme Court of the United States

October Term, 1997

DONALD A. BARNETT, SHEILA GOLD, RONDA CHANEY, LON CHANEY, JR., WILLIAM MITCHELL and ROBERT Q. BUICKEROOD,

Petitioners,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH and ANTHONY BLUMBERG,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the certification and settlement of a class action, without affording class members the right to opt out of the class or the settlement, violates the Due Process Clause of the Fourteenth Amendment, where the class members possess substantial claims for monetary relief which are foreclosed by the settlement.

LIST OF PARTIES

Petitioners are former limited partners of certain limited partnerships which were consolidated with other business entities in a "roll-up" transaction. Petitioners objected to the settlement of the class action lawsuit that arose from the transaction, but the trial court approved the settlement notwithstanding their objection. The California Court of Appeal for the First Appellate District affirmed the trial court's decision in *Donald Barnett, et al., v. Glenborough Realty Corporation, et al., and Anthony Blumberg*, slip op. A075278 (Feb.27, 1998). Petitioners' petition to the California Supreme Court for review of the decision of the Court of Appeal was denied on May 20, 1998. Petitioners are Donald A. Barnett, Sheila Gold, Ronda Chaney, Lon Chaney, Jr., William Mitchell and Robert Buickerood.

The respondents are Glenborough Realty Corporation (a California Corporation), Glenborough Corporation (a California Corporation) and Robert Batinovich, defendants below; and Anthony Blumberg, who was the plaintiff and class representative below.

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The opinion of the California Court of Appeal for the First Appellate District affirming the decision of the California Superior Court for the County of San Mateo to certify a mandatory class for the purpose of settlement of the class action lawsuit below and to approve the settlement is reprinted in the Appendix, beginning at page App. 1. The decision of the California Supreme Court denying Petitioners' petition for review of the decision of the California Court of Appeal for the First Appellate District is reprinted in the Appendix, at page App. 26. The opinion of the California Superior Court for the County of San Mateo granting preliminary approval to the settlement and certifying a mandatory class for the purpose of the settlement is reprinted in the Appendix, beginning at page App. 27. The opinion of the California Superior Court for the County of San Mateo giving final approval to the settlement of the class action lawsuit below is reprinted in the Appendix, beginning at page App. 49. All of these decisions are unreported.

JURISDICTION

The decision of the California Court of Appeal for the First Appellate District affirming the decision of the California Superior Court for the County of San Mateo to certify a mandatory class for the purpose of settlement of the class action lawsuit below and to approve the settlement was entered on February 17, 1998. Petitioner's timely petition for review of the Court of Appeal's decision to the California Supreme Court was denied on May

20, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

I. STATEMENT OF THE CASE

A. Introduction

This Petition presents a fundamental issue of constitutional law: whether the Due Process Clause of the Fourteenth Amendment permits the certification of a mandatory, non-opt-out class in connection with a class action settlement which forecloses substantial damages claims. This Court has twice granted a writ of certiorari to resolve this precise issue – first, in *Ticor Title Ins. Co. v. Brown*, 510 U.S. 810, 114 S.Ct. 56, 126 L.Ed.2d 26 (1992), and again, in *Adams v. Robertson*, 518 U.S. 1056, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996). However, in both *Ticor* and *Adams*, the Court dismissed the writ as improvidently granted. In *Ticor*, prudential considerations dictated that the Court not decide whether a mandatory class offended the Due Process Clause in light of the unique posture in which the case arose. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). In *Adams*, it was determined that the petitioner had not properly presented the constitutional question to the lower courts.

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). The Court noted its "continuing interest in this issue," 137 L.Ed.2d at 211 n.6, but held that its procedural rules required the dismissal of the writ.

This case presents the issue of the constitutional propriety of a mandatory class in a form in which this Court can decide it. The prudential considerations which caused the Court to decline to decide *Ticor* are not present here. Moreover, unlike in *Adams*, the constitutional question was expressly presented and decided below.

Indeed, this case presents the issue of the due process implications of a mandatory class settlement in its starkest form. Here, the class settlement released class members' damages claims with an estimated value of between $10 and $20 million. Yet, in exchange for the surrender of such valuable claims in the class action settlement, the members of the class received *no* monetary consideration: no cash, no credits, no coupons, no stock or other securities – indeed, no tangible consideration of any kind whatsoever.

As this Court recognized in granting certiorari in *Ticor* and *Adams*, the permissibility of a mandatory class in connection with a class action settlement which forecloses substantial damages claims is an important constitutional issue. Moreover, that issue is of considerable *practical* import to the administration of class actions in the lower courts. The question of whether or not an opt-out right must be extended to class members arises, actually or potentially, in virtually all class actions. The lower courts and class action practitioners require this Court's

guidance in determining what the constitution permits them to do in class action cases.

The need for this Court's guidance is particularly pronounced because those lower courts which have considered the constitutional issue have decided it in disparate and contradictory ways. Thus, the Ninth Circuit Court of Appeals, in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994), held unequivocally that a class action judgment which purports to release the substantial damages claims of class members without providing a right to opt out of the class violates the Due Process Clause and is therefore not binding on the members of the class. *Accord Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521 (D. Nev. 1997). The California Court of Appeal below, relying on the prior California case of *Bell v. American Title Ins. Co.*, 226 Cal.App.3d 1589, 277 Cal.Rptr. 583 (1991), has rejected the Ninth Circuit's holding in *Brown*, holding that a mandatory settlement class is constitutionally permissible even where it releases substantial damages claims.

A conflict exists on this issue not only between the federal and California courts but also between different federal circuits. Thus, the Third Circuit has held that substantial damages claims can be extinguished through a mandatory class settlement as long as the court has *in personam* jurisdiction over the class members. *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 & 1560 n.8. (3d Cir.), *cert. denied*, 513 U.S. 986, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994). The Ninth Circuit, in turn, has expressly *rejected* the Third Circuit's holding in *Grimes*, stating that the constitutional right to opt out *is not*

limited to those absent class members over whom the trial court lacks *in personam* jurisdiction. *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1242 (9th Cir. 1997); *Brown*, 982 F.2d at 392. Petitioners submit that this Court should grant certiorari to resolve these conflicts.

B. Factual Background

The action below arose out of the consolidation of certain publicly traded limited partnerships[1] into Glenborough Realty Trust, Inc., a newly created real estate investment trust (the "REIT"). The consolidation was of a type known as a "roll-up," and it is referred to herein as "the Roll-Up." Under its terms, the Partnerships were combined not only with each other but also with various businesses and business interests owned or controlled by the Partnerships' General Partners, defendants Glenborough Realty Corporation ("GRC") and Robert Batinovich ("Batinovich") (collectively, "the General Partners") to form the REIT. Shares in the REIT were then allocated among the approximately 18,000 limited partners in the Partnerships ("the Limited Partners"), on the one hand, and the General Partners and persons and entities affiliated with them, on the other.

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[1] The limited partnerships in question were Equitec Income Real Estate Investors B, Equitec Income Real Estate Investors C, Equitec Income Real Estate Investors – Equity Fund IV, Equitec Mortgage Investors Fund IV, Equitec 79 Real Estate Investors Outlook Properties Fund IV, Glenborough All Suite Hotels, L.P., and Glenborough Pension Investors. They are collectively referred to hereinafter as the "Partnerships".

C. Procedural Background

1. The Complaint

The action below was commenced in the Superior Court of the State of California for the County of San Mateo on February 21, 1995, at a time when the Roll-Up had been formally proposed but had not yet occurred. The complaint filed by plaintiff Anthony Blumberg ("Blumberg") alleged that the Roll-Up was "unfair," "coercive" and "deceptive" to the Limited Partners in that (1) the amount of common stock of the REIT to be issued to the General Partners and their affiliates in the Roll-Up was excessive and disproportionate; (2) the Roll-Up would prevent previously scheduled liquidations of the Partnerships' properties, to the Limited Partners' detriment; and (3) the Roll-Up was designed to perpetuate the General Partners' ability to earn management fees and other consideration, to the disadvantage of the Limited Partners.[2]

The complaint alleged two causes of action, for breach of fiduciary duty and breach of the duty of good

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[2] "Rollups" have been extensively criticized on the ground that they almost always benefit and enrich the general partners at the expense of the Limited Partners. *See, e.g.*, John Geschke, *Regulating Rollups: General Partners' Fiduciary Obligations In Light of the Limited Partnership Rollup Reform Act of 1993*, 47 Stan.L.Rev. 85 (1994). Indeed, perceived abuses by general partners in effectuating such transactions have led to both federal and state legislation to prevent further abuse. *See* Limited Partnership Rollup Reform Act of 1993 (15 U.S.C. § 78n(h) *et seq.*; Killea-Thompson Act (Cal. Corp. Code § 25014.5 *et seq.*)

faith and fair dealing, and sought money damages and injunctive relief. Named as defendants were the General Partners and Glenborough Corporation ("GC"), an entity controlled by the General Partners which was to be one of the entities consolidated in the Roll-Up.

Blumberg did little to actively prosecute the action. Rather, almost immediately after filing the action, Blumberg's attorneys began discussing settlement with the defendants. Some three months after these talks began – and barely four months after the Complaint was filed – plaintiff Blumberg and the defendants reached "substantial agreement" on the substance of a settlement. At the time of the agreement, no formal discovery had been conducted, and the sum total of information obtained by plaintiff Blumberg from defendants consisted of one and one-half boxes of documents made available for purposes of the settlement discussions only.

2. The Settlement

A formal settlement agreement was executed on October 9, 1995. The parties agreed, first, to jointly propose to the court the creation of a mandatory "Settlement Class" consisting of all Limited Partners. The Settlement Agreement provided that no member of the class would have the right to opt out or otherwise exclude himself from the class, and that the settlement, if approved by the court, would bind all Limited Partners. App. 42.

On behalf of the "Settlement Class," Blumberg agreed to a broad release of all claims arising out of the Roll-Up which were or could have been asserted by any

Limited Partner against any person, whether named as a defendant in the action or not. App. 43. The claims released included claims for money damages estimated at between $10 million and $20 million. Nevertheless, the Settlement Agreement did not provide for the payment of any money or other tangible consideration by the defendants to the members of the class. App. 40-42.

Rather, the sum total of the consideration obtained for the class in the settlement consisted of (1) the addition of four "curative disclosures," consisting of eight sentences in all, to the over 400-page prospectus prepared and disseminated in connection with the Roll-Up;[3] and (2) a modification of certain conditions on the sale of REIT stock or the issuance of stock options in the REIT.[4] Neither the eight sentences added to the prospectus nor the provisions relating to stock or stock options even

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[3] By the time the Settlement Agreement was signed, the defendants had already added these eight sentences to a new version of the prospectus which they had issued to the Limited Partners.

[4] There were three such modifications: *First*, the defendants and their affiliates had already agreed not to sell their REIT stock for one year after the Roll-Up without the permission of the REIT's Board of Directors. This restriction was extended by an additional year, to two years. *Second*, the REIT was already forbidden to issue stock options to its employees for 60 days after the Roll-Up. This prohibition was extended by an additional 30 days, to 90 days after the Roll-Up. *Third*, defendants agreed that the REIT would not grant any stock options with an exercise price of less than $15.00 per share for one year after the Roll-Up. App. 41-42.

purported to remedy any of the respects in which the complaint had contended that the Roll-Up was unfair. They did not readjust the allocation of REIT stock between the Limited Partners, on the one hand, and the General Partners and their affiliates, on the other, which the complaint had alleged was unduly favorable to the General Partners. They did not alter in any way the reality that consolidation would prevent the Partnerships from liquidating their assets as previously planned and distributing the proceeds of such liquidation to the Limited Partners. Furthermore, they did nothing about the perpetuation of excessive management and other fees alleged in the complaint.

While the settlement did not afford the Limited Partners any monetary relief, it was more generous to the plaintiff class representative and his attorneys. Under the terms of the settlement, the plaintiff class representative, Mr. Blumberg, was authorized to seek an "incentive bonus" of $5,000, and the two law firms representing Mr. Blumberg were entitled to seek attorneys' fees and costs in the amount of $850,000.[5]

3. Class Certification and Objections To The Settlement

Immediately after executing the settlement agreement, the parties sought preliminary approval of the

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[5] App. 52. The attorneys' fees to be received by Mr. Blumberg's counsel amounted to approximately $1,000 for each hour worked on the case.

settlement. On or about October 11, 1995 – two days after the agreement was signed – the parties appeared *ex parte* before the trial court to seek an order certifying the settlement class and preliminarily approving the proposed settlement. It appears, however that no paper of any kind was presented to the court other than the settlement agreement and the proposed order itself. Moreover, there is no transcript of the proceedings before the court.

By Order dated October 11, 1995, the trial court certified a plaintiff class for purposes of the settlement and granted preliminary approval to the settlement. The trial court's class certification order stated that the class was certified pursuant to section 382 of the California Code of Civil Procedure,[6] and was conditioned on final approval of the settlement. The law firms representing the plaintiff, Mr. Blumberg, were appointed as Class Counsel. The portion of the Order certifying a mandatory class was extremely brief, and incorporated neither discussion nor analysis of the released claims. Rather, the Order simply provided that members of the class "are precluded from

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[6] The Order also referred to Federal Rules of Civil Procedure 23(b)(1) and (b)(2). Under California law, federal rules and precedents regarding class actions are not controlling but, rather, are merely of persuasive value, even with respect to issues on which the California courts have not spoken. *Vasquez v. Superior Court*, 4 Cal.3d 800, 821, 94 Cal.Rptr. 796 (1971).

excluding themselves from the Final Judgment . . . and may not opt out of the Settlement Class." App. 42.

Two groups of Limited Partners (of whom one comprised the Petitioners herein) and four individual Limited Partners filed objections to the proposed settlement. Among other things, it was argued that the trial court had violated the due process rights of the absent class members by certifying a mandatory non-opt out settlement class which would extinguish substantial claims for money damages. The trial court held a hearing on the application for final approval of the settlement on January 17, 1996. By that time, the Roll-Up had already occurred. Accordingly, any effort to enjoin the transaction was moot, and the only relief prayed for in the complaint which would have been available to the class members had the settlement not been approved was damages. By written order dated June 4, 1996, the trial court overruled the objections asserted by the objecting class members and granted final approval of the settlement. App. 49.

4. The Appeal

Petitioners appealed the decision of the trial court to the California Court of Appeal. Petitioners argued, *inter alia*, that the trial court had violated the due process rights of the absent class members by certifying a mandatory class for purposes of a settlement which released substantial damages claims.

The Court of Appeal affirmed the ruling of the trial court. In an opinion dated February 18, 1998, the Court of Appeal held, *inter alia*, that the constitutional opt-out

right recognized in this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), did not apply to class actions in which both money damages and injunctive relief were sought, so long as the trial court concluded, either explicitly or implicitly, that the relief obtained in the settlement was primarily equitable.

The Court of Appeal first found that *Shutts* was limited "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." App. 18. The Court of Appeal held that *Shutts* "did not compel a due process right to opt out of a class action" in actions such as the one below, where both equitable relief and money damages were sought. App. 19. Instead, the Court of Appeal found that it is in the trial court's discretion to determine whether an action seeks predominantly money damages or injunctive relief. App. 20-21. If the trial court found that the action seeks "predominantly" equitable relief, there is no constitutional right for absent class members to exclude themselves from the settlement. *Id.*

The Court of Appeal then found that certification of the settlement class in the action below was "appropriate" because (1) there was a likelihood of separate actions against the defendants and therefore a risk of inconsistent results for the defendants, and (2) defendants' actions, as alleged in Blumberg's complaint, constituted a common course of conduct toward the plaintiff class and the complaint sought equitable relief. App. 21.

The Court of Appeal dismissed Petitioners' objections that the trial court had made no finding that the

action below was primarily for equitable relief. Instead, the Court of Appeal held that the trial court had "implicitly" found that equitable relief predominated in the action below, and therefore the due process rights of absent class members were not offended by the certification of a mandatory class. App. 22. The Court of Appeal also gave little, if any, weight to the nature of the claims released by the settlement, and instead focused exclusively on the claims asserted in the complaint and the nature of the relief obtained in the settlement, which it found to be predominantly equitable. Although the Court of Appeal acknowledged that the settlement extinguished the claims for damages held by the members of the plaintiff class, the court found that because some equitable relief had been obtained in the settlement, and because the complaint sought equitable relief, a mandatory class did not deprive the plaintiff class of due process. *Id.*

In sum, the Court of Appeal held that, in hybrid class action lawsuits involving claims for both money damages and equitable relief, the trial court has complete discretion to determine whether damages or injunctive relief predominate. If the trial court determines, even "implicitly," that equitable relief predominates, the claims of absent class members for money damages may be forever extinguished as part of a mandatory class settlement, even where the settlement provides them with no consideration of any monetary value.

Following the decision of the Court of Appeal, Petitioners sought review from the California Supreme Court. Petitioners again asserted, *inter alia*, that the due process rights of the plaintiff class had been violated by the certification of a mandatory, non-opt out settlement class

in connection with a settlement that foreclosed substantial damages claims. On May 20, 1998, the California Supreme Court summarily denied the objectors' petition for review. App. 26.

II. REASONS FOR GRANTING THE WRIT

A. This Petition Presents An Important Issue Of Constitutional Law Which Should Be Resolved By This Court

A writ of certiorari should be granted to review the California Court of Appeal's decision because this case presents an important contitutional issue which requires resolution by this Court.

In *Phillips Petroleum v. Shutts, supra,* this Court held that, in a class action lawsuit that seeks predominantly money damages, minimum due process requires that absent class members be allowed to exclude themselves from the lawsuit. In *Brown v. Ticor Title Ins.Co.*, 982 F.2d at 392, the Ninth Circuit Court of Appeals held that where a class action settlement forecloses *substantial* damages claims, the principle enunciated in *Shutts* applies and due process requires that an opt-out right be extended to the members of the class.

In the action below, the complaint asserted claims for both equitable relief and money damages. By the time the settlement was reached, the claims for equitable relief asserted in the complaint were moot because the Roll-Up had already occurred. Accordingly, while the Settlement Agreement, by its terms, released both damages claims

and equitable claims, the claims released, as a practical matter, were virtually exclusively claims for damages. Nevertheless, the trial court approved the mandatory class certification and, although the trial judge made no explicit findings on the issue, the California Court of Appeals held that a mandatory class was permissible because the trial court had *implicitly* found that the equitable claims predominated over any claims for damages.

The issue at stake in this case is what degree of protection the Constitution affords to class members – in this case, over 18,000 class members – who are not in court to protect their own interests. More concretely, should class members who are not in court be put at risk of losing valuable property rights of constitutional dimension based on "implicit findings"?

This issue is far from merely theoretical – it is of widespread importance and considerable practical significance in the administration of justice. Class actions are an important tool for the management of complex litigation. Whether or not a mandatory class is permissible arises, either actually or potentially, in every class action.

The question presented by this Petition is of great importance to the lower courts, which must administer and manage class action litigation, to litigants and practitioners and to innumerable absent class members. Indeed, this Court has twice granted certiorari regarding this issue, only to dismiss the writs as improvidently granted.

In *Ticor Title Ins. Co. v. Brown, supra,* the litigants had fully briefed the issue and the Court had heard oral argument from counsel when the Court determined that

the posture of the case before it was procedurally improper for deciding the issue presented. *Id.*, 128 L.Ed.2d at 38.

The Court held that prudential considerations required it to consider the narrower, non-constitutional question of whether a mandatory class foreclosing substantial damages claims is proper *under the Federal Rules*, before addressing whether or not the constitution permitted the certification of such a class. However, the Court determined that in light of the procedural posture in which the *Ticor* case arose, the litigants were precluded by *res judicata* from arguing, and the Court was therefore foreclosed from considering, that non-constitutional issue. The Court held that it would be inappropriate to decide the constitutional issue on a record on which consideration of the narrower, non-constitutional issue was infeasible.

The problem which caused the Court to dismiss certiorari in *Ticor* is not present here. This case arose under California law rather than under the Federal Rules of Civil Procedure. Accordingly, the issue of whether or not Rule 23 would permit the certification of a mandatory class in a damages case is not before this Court,[7] and the

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[7] While the trial court's class certification order referenced Rule 23 and the Court of Appeal's decision discussed authorities decided thereunder, neither the Rule nor any cases thereunder were relied on as *controlling* precedents but, rather, only for their persuasive value. *See* note 6, *supra*. Therefore, the non-constitutional issue which caused the Court to dismiss certiorari in *Ticor* simply does not arise in this case and, accordingly, presents no obstacle to the consideration of the constitutional issue.

Court is not precluded from considering the constitutional question presented in this Petition.

Only two years after dismissing the writ in *Ticor*, this Court, in recognition of the continuing importance of this issue, once again granted certiorari to consider it in *Adams v. Robertson*, 518 U.S. 1056, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996). However, the Court dismissed the writ as improvidently granted after determining that the state court below had not had the opportunity to address the constitutional issue presented. *Adams v. Robertson*, 137 L.Ed.2d at 210 (1997). Here, however, the lower courts have heard and decided the issue presented. Accordingly, there is no impediment to this Court's consideration of this issue.

B. The California Court Of Appeal's Decision Deprives Class Members Of Their Due Process Rights

1. Due Process Requires That Class Members Be Permitted To Exclude Themselves From The Class Where Substantial Claims For Money Damages Are To Be Extinguished

This petition should be granted because the decision of the California Court of Appeal conflicts with federal law and deprives petitioners and class members of their substantial claims for monetary damages without due process of law. In *Shutts, supra*, this Court held that due

process rights of an absent class member in a class action predominantly seeking a money judgment are satisfied if the plaintiff receives reasonable notice, an opportunity to be heard and to meaningfully partake in the litigation, adequate representation, and "at a minimum . . . an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court." *Id.* at 811-12.

As the Ninth Circuit made clear in *Brown v. Ticor Title*, the due process right to opt out attaches where a mandatory class settlement forecloses damages claims which are *substantial*. Moreover, *Brown* holds that in determining whether the opt-out right recognized in *Shutts* will apply to a class action settlement, one must look at the claims released in – or, in *Brown's* terminology, the claims "foreclosed by" – the settlement.

The decision of the California Court of Appeal below offends against these principles. That decision approves a mandatory class settlement in a case in which the claims released are predominantly for money damages. Moreover, in concluding that equitable claims "predominate" over monetary claims, it focuses unduly on the consideration *received* in the settlement – consideration which concededly was of no monetary value – rather than on the claims released in the settlement. This is error. To determine whether damages or equitable relief predominates, courts should examine *all* claims that would be barred by the res judicata effect of the settlement's release. *See*, H. Newberg and A. Conte, *Newberg on Class Actions*, § 12.17 (3d ed. 1992).

In subjecting an absent class member to a class action settlement, a court employs the judicial power of the government to take away the class members' property rights by enforcing a release of individual claims. The constitutional guarantee of due process, by its very terms, exists to protect the claims possessed by the class members and to ensure that they are not released without adequate procedural and substantive safeguards. *See In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) at 998-99 (Smith, J., dissenting). Thus, it is the claims released, not the consideration received in the settlement, that due process protects. Accordingly, one must look to the nature and scope of the claims released to determine what process is due.

Here, the claims released included substantial claims for damages. The complaint filed by plaintiff Blumberg asserted claims for money damages and equitable relief. By the time of the settlement, however, the only meaningful relief still available to the members of the plaintiff class was money damages. Blumberg's prayer that the Roll-Up should be enjoined was moot at the time the trial court approved the Settlement because, by that time, the Roll-Up had already been consummated. Obviously, the trial court could not issue an injunction to prevent that which had already occurred.

Moreover, rescission was also unavailable at the time of the settlement. After the Roll-Up was consummated, the REIT's shares began to trade publicly on the New York Stock Exchange. Thus, the class of persons who owned interests in the Partnerships at the time of the Roll-Up was no longer identical to the class of persons

who *now* own stock in the REIT. Rescission would therefore have substantially affected the interests of subsequent purchasers of REIT stock who were not before the court, and was therefore unavailable as a remedy to the class. *Cf. Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 209 (3d. Cir. 1990) (defrauded buyer of securities pursuant to a prospectus is entitled to rescission under section 12(2) of the Securities Act if buyer still owns stock, and damages otherwise). Subsequent purchasers would not be entitled to rescind their purchases because any loss they might have suffered by purchasing publicly traded shares could not be connected with the injury defendants inflicted on the Limited Partners. *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1422 (9th Cir. 1994), *cert. denied*, 516 U.S. 868 (1995) ("Loss causation exists where the misrepresentation touches upon the reasons for the investment's decline in value").

Thus, by the time of the settlement, monetary claims were the *only* effective remedy remaining to the members of the plaintiff class. Nevertheless, plaintiff Blumberg released *all* of those claims in the settlement, and provided no opportunity for class members to exclude themselves from that release. Because absent class members could not opt out of the settlement disposing of their monetary claims, their due process rights were violated.

2. Certification Of A Mandatory Class Cannot Be Justified By Reference To Federal Rules Of Civil Procedure 23(b)(1)(A) Or 23(b)(2)

In its discussion of the propriety of mandatory class certification, the California Court of Appeal cited Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2) and precedents decided thereunder. As noted above, these were cited for their persuasive value rather than as controlling authority. In any event, the lower court's references to Rules 23(b)(1) and 23(b)(2) do not justify what was done here, for two reasons. First, as this Court recognized in *Ticor*, 128 L.Ed.2d at 38, even if a mandatory class were permitted under Rule 23 (or under the California statute governing class actions, California Code of Civil Procedure § 382), that would not mean that a denial of the opt-out right is *constitutionally* proper. Accordingly, the Court of Appeal's references to Rule 23 are without merit.

Furthermore, the mandatory class certified in this action *is not* of the type historically allowed under the terms of Rules 23(b)(1) and 23(b)(2).

Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure provides that a class action is maintainable under that section if a separate action would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Fed.R.Civ.P. 23(b)(1)(A). This rule is typically used to certify classes where there is a substantial risk of multiple lawsuits where the outcome of those lawsuits would impair the ability of the party opposing class

certification to pursue a uniform continuing course of conduct. Typically, such situations arise where the opposing party is under a legal duty to treat all class members alike.

The law is clear, however, that the mere fact that some plaintiffs might be successful in individual lawsuits against a defendant while others may not is not a ground for invoking Rule 23(b)(1)(A). *E.g., In re Benedictin Products Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984); *McDonnell Douglas Corp. v. United States District Court for the Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *In re "Agent Orange" Products Liab. Litig.*, 100 F.R.D. 718, 724-25 (E.D.N.Y. 1983), *petition for mandamus denied sub. nom. In re Diamond Shamrock Chemicals. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

In the action below, the primary claims asserted in the litigation and extinguished by the settlement below are for money damages. The risk of inconsistent adjudications resulting from individual actions for money judgments does not warrant certification of a mandatory, non-opt out class under Rule 23(b)(1)(A). The trial court's purported finding that class certification was proper by analogy with Rule 23(b)(1)(A) is therefore insupportable.

Nor is the class certified here of a type that has historically been certified under Rule 23(b)(1)(B). That rule provides for certification of a class where adjudications by individual class members "would as a practical matter be dispositive of the interests of the other members [of the class] not parties to the adjudications . . . " Fed.R.Civ.P. 23(b)(1)(B). Although many courts have held

that a limited fund theory justifies a mandatory class under that rule, there is no limited fund in this case. Nor did the trial court conduct any fact-finding inquiry as to the existence of a limited fund, as it must in a Rule 23(b)(2) case. *See, e.g., In re Asbestos Litig.*, 90 F.3d at 983 (5th Cir. 1996); *In re Joint Eastern and Southern Dist. Asbestos Litig. (Findley)*, 982 F.2d 721, 739 (2d Cir. 1992); *In re Benedictin*, 749 F.2d at 306; *In re Dalkon Shield IUD Products Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re "Agent Orange,"* 100 F.R.D. at 727.

Rule 23(b)(2) is equally inapposite. That Rule provides that a class may be certified where "the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . " Fed.R.Civ.P. 23 (b)(2).

The Advisory Committee to Rule 23 stated that Rule 23(b)(2) is intended "to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature . . . is appropriate." Advisory Committee Notes to Proposed Amendments to Federal Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966). The Advisory Committee illustrated the application of proposed Rule 23(b)(2) with reference to civil rights actions and patent litigation seeking specific or declaratory relief. *Id.* However, a class certified under this rule cannot be justified on the grounds that the case below is one in which the relief sought is "primarily declaratory or injunctive relief." *Id.*

As discussed above, at the time of the settlement, only claims for money damages remained. The equitable relief sought by the complaint had been rendered moot. Minor corrections to the Roll-Up prospectus and insignificant delays in the issuance, sale or purchase of stock or stock options comprised the only consideration received in the settlement. The price paid by the members of the plaintiff class was the extinguishment of all claims for money damages arising out of the Roll-Up.

In examining whether an action is "primarily" one for injunctive and declaratory relief under Rule 23(b)(2), courts look to whether the monetary relief requested is either (1) equitable in nature or (2) secondary or ancillary to the declaratory relief sought. *Newberg on Class Actions, supra,* at § 4.14. Thus, for example, an action may be certified under Rule 23 (b)(2) in employment discrimination class actions where back-pay is requested in addition to injunctive relief. Such cases are certified under the theory that back-pay is nothing more than "equitable restitution" directly flowing from the injunctive relief. *See, e.g., Probe v. State Teachers' Retirement System,* 780 F.2d 776 (9th Cir), *cert. denied,* 476 U.S. 1170 (1986).

Here, the trial court made no finding that this action was primarily for injunctive relief. Indeed, no such finding could have been made because the complaint explicitly sought *compensatory damages.* Such damages are not equitable, nor are they ancillary to the injunctive relief prayed for. *See e.g., Williams v. Owens Illinois, Inc.,* 665 F.2d 918 (9th Cir.), *cert. denied,* 459 U.S. 971 (1982) (trial court properly refused to certify compensatory damage claims in employment discrimination case). Thus, this

case was not one seeking "primarily injunctive relief," and it was error to certify a mandatory settlement class.

Brown v. Ticor Title Insurance Company, supra, 982 F.2d at 392, illustrates this point. In *Brown,* the plaintiffs sought treble damages and an injunction against a title insurance company for alleged antitrust violations relating to title search and examination fees. The trial court approved a mandatory class settlement that extinguished the monetary claims and provided for an injunction and other related relief. *Id.* at 398.

The Ninth Circuit Court of Appeals held that the mandatory class provision, insofar as it related to monetary relief, violated absent class members' due process rights. *Id.* at 392. In determining whether the claim was "primarily" for injunctive relief, the Court followed the Third Circuit's holding that the litigation was "a hybrid suit that involved the *foreclosure of substantial damage claims.*" *Id.* (emphasis in the original). Because class members were not provided the right to opt out, the appellate court held that claims for monetary damages could not be barred.

Brown v. Ticor Title is directly on point here. The mandatory settlement class certified here "foreclose[d] . . . substantial damage claims" of absent class members without giving them an opportunity to opt out of the class. Accordingly, the certification of a mandatory class in this action violated the due process rights of absent class members and, accordingly, merits review by this Court.

C. Review Is Necessary To Resolve A Conflict Between The Federal And State Courts, And Among The Federal Circuits

Finally, this Court should grant a writ of certiorari to resolve a conflict between the federal and state courts, and among the federal circuits, on an important constitutional issue. The resolution of such conflicts has long been held to be a compelling justification for the issuance of a writ of certiorari. 16B Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4017 at 270 (1996). *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 826 (1988) (certiorari granted to resolve a conflict among the courts); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 674, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), *modified* 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979) (certiorari granted to resolve conflict between the state and federal courts).

There is a direct conflict between the Ninth Circuit's decision in *Brown v. Ticor Title, supra,* and the California Court of Appeal's ruling below. *Brown* holds that the Due Process Clause forbids the courts from approving a mandatory class settlement without extending an opt-out right to all class members, where the settlement forecloses substantial damages claims. *Accord, Epstein v. MCA, Inc.*, 126 F.3d at 1242. The Court of Appeal's decision herein is directly to the contrary, holding that as long as a trial judge has made an "implicit finding" that equitable claims predominate, a mandatory class settlement is constitutionally permissible even if the settlement forecloses substantial damages claims. The Court of Appeal's decision relies on the prior California case of *Bell v. American Title Co., supra,* which similarly resolves the

federal constitutional issue in a manner which contradicts the Ninth Circuit's holding in *Brown*.

There is also a conflict between the federal circuits. In *Grimes v. Vitalink, supra,* the Third Circuit held that a mandatory class settlement is permissible, even where the settlement forecloses substantial damages claims, as long as the court has *in personam* jurisdiction over the absent class members. This holding as well is directly contrary to the Ninth Circuit's holding in *Brown* and *Epstein* that the due process right to opt of a class or a class action settlement which forecloses substantial damages claims is not limited to those persons over whom the trial court lacks *in personam* jurisdiction but, rather, extends to all class members. The Ninth Circuit has expressly held that it rejects the Third Circuit's holding in *Grimes*. *Epstein,* 126 F.3d at 1242.

Petitioners submit that the Court should grant certiorari to resolve these conflicts.

III. CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the California court.

Dated: August 18, 1998

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DONALD BARNETT et al., Plaintiffs and Appellants, v. GLENBOROUGH REALTY CORPORATION et al., Defendants and Respondents; ANTHONY BLUMBERG, Plaintiff and Respondent.	A075278 (San Mateo County Super. Ct. No. 391223) (Filed Feb. 17, 1998)

This is an appeal from an order approving settlement of a class action brought on behalf of limited partner unitholders in eight real estate limited partnerships.[1] The lawsuit challenged a proposed "roll-up" transaction

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[1] Appellants herein are six plaintiff class members and objectors to the settlement (hereafter, objectors). Respondents are Anthony Blumberg, named plaintiff, and Glenborough Realty Corporation (GRC), Glenborough Corporation (GC) and Robert Batinovich (sometimes referred to collectively as "Glenborough").

At the time of the proposed rollup, Batinovich was president of GRC and owned and controlled GC. GRC in turn was wholly owned by GC.

whereby the limited partnerships and GC would merge into a newly created real estate investment trust (REIT) called Glenborough Realty Trust Incorporated (GRTI). In simple terms, the limited partnership interests would be converted into shares of the publicly traded REIT. Among other things, the complaint charged that the proposed allocation of REIT shares among the general partners and the limited partners was unfair.

We conclude that the trial court did not abuse its discretion in approving the settlement and accordingly affirm the judgment.

I. BACKGROUND

The limited partnerships were formed between 1979 and 1988. GRC assumed management of all partnerships during the period 1989-1991.

The offering materials for the limited partnerships contemplated investment holding periods of between three and fifteen years, after which the assets would be liquidated and the proceeds distributed to the limited partners. The limited partners were also entitled to preferred annual returns, and if the returns were not actually paid annually, they would accumulate.

At the time of the proposed rollup, only two of the eight partnerships had returned the limited partners' original investment. Limited partnership units were traded sporadically in the secondary market. During the period 1992-1995, trading of the units was at a deep discount from the original cost and the net assessed value.

In September 1994, GRTI filed a "Form S-4" registration statement (S-4) with the Securities and Exchange Commission (SEC) and several amendments followed. The S-4 proposed a rollup whereby the limited partnerships and GC would merge with and into the REIT. In exchange, the REIT would issue shares of common stock to the limited partners as well as to the shareholders of GC. The S-4 also identified three levels of allocation of interests in the REIT: level 1, between the limited partnerships as a group and GC; level 2, among the partnerships; and level 3, between the general partners and the limited partners of each partnership.

Blumberg, on behalf of himself and all holders of units of the limited partnerships – alleged at approximately 18,000 – filed suit on February 21, 1995, charging that through the rollup, the general partners would convert ownership of a worthless management company – GC – into a 22-28 percent interest in the REIT. Specifically, the level I allocation called for an excessive allocation of ownership in the REIT to GC. Further, the rollup would prevent the limited partners from selling their assets for profit. Finally, the complaint alleged that the general partners cooked up the rollup to perpetuate their ability to earn management fees and other consideration. The complaint alleged causes of action for breach of fiduciary duty and the duty of good faith and fair dealing and sought injunctive and declaratory relief, an [sic] accounting and compensatory damages.

In mid-March 1995 counsel for Glenborough inquired about exploring settlement. Glenborough agreed to provide certain critical information without formal discovery, and further agreed not to " 'go effective' " with the

registration statement on a schedule that would inhibit the right to formal discovery, if necessary. Meanwhile, Blumberg's counsel retained a financial expert from Coopers & Lybrand.

Discussions to explore settlement commenced April 6, 1995. Thereafter, Glenborough provided Blumberg's counsel with SEC comments on the registration statement and other requested information. Discussions at the second meeting focused primarily on the level I allocation and Blumberg's claim that it was unfair. Glenborough argued that additional cash flow being provided under a newly closed acquisition not reflected in the then-current registration statement (the Rancon transaction) would justify allocation of shares to GC of approximately 29 percent, but it nonetheless would *leave* the allocation at the proposed pre-Rancon level of 20.2 percent.

Following that meeting, Blumberg's team reviewed the revisions to the transaction and the valuation concepts. It preliminarily concluded that with the inclusion of the new cash flow, the proposed transaction was approaching a range of reasonableness when compared with similar transactions. The team decided to undertake further investigation and analysis, including analysis of three comparable transactions referenced in the registration materials and compilation of information concerning trading prices and earnings multiples of publicly traded REIT's. As well, the team obtained more information about contributed debt, GC expenses and the fairness opinion rendered in connection with the transaction. Thereafter, Blumberg's team met with its financial expert to analyze the information. It concluded that with the

inclusion of the Rancon cash flow, the level I allocation came within the range of reasonableness.

Additional meetings, communications and information exchange took place. At the close of an hour and a half conference call with defense counsel on June 21, 1995, the parties reached an agreement in principle on the terms of a settlement which emphasized additional disclosures and additional restrictions on the sale of shares by Batinovich.

The process of documenting the agreement was extensive, resulting in exchange and review of numerous drafts. The parties executed the final settlement agreement in October 1995. Pursuant to the settlement, all claims of the limited partners relating to the rollup – for equitable relief as well as money damages – were resolved and Glenborough was released from all liability. The settlement class – consisting of all persons holding units of the limited partnerships – was mandatory – i.e., no one could opt out of the settlement or otherwise exclude themselves from the final judgment. Under the settlement, the limited partners would receive no economic consideration for release of their claims. Benefits were limited to additional disclosures and certain restrictions relating to REIT stock or stock options.

On October 11, 1995, the court entered an order certifying a settlement class, approving notice of the proposed settlement and setting the hearing for December 21, 1995. Some 13 class members lodged objections to the settlement. The trial court continued the hearing to January 17, 1996, and thereafter accepted additional briefing from objectors and responses from Blumberg and defendants.

Ultimately, the trial court approved the settlement and this appeal followed.

Meanwhile, the final prospectus/consent solicitation for the rollup was issued on October 26, 1995. It set a December 28, 1995, deadline for voting on the transaction. The rollup transaction closed, with some 80 percent of those who voted on the proposal voting, in favor of the transaction.

II. STANDARD OF REVIEW

Settlement of a class action requires judicial determination that the settlement is fair, adequate and reasonable. Court approval is required in order to prevent fraud, collusion or unfairness to class members. *(Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801.)

The trial court has broad discretion to determine the fairness of a proposed settlement. Thus in reviewing, a settlement we should refrain from deciding the merits of the case, confining our task to a review of the lower court's approval for a clear abuse of discretion. We do not substitute our notion of fairness for that of the trial court or the parties to the agreement. *(Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th at p. 1802 & fn. 8.)

In exercising its discretion the trial court should consider the relevant factors, including, the strength of plaintiffs' case – the risks, complexity, expense and probable duration of further litigation; the risk of maintaining the class action through trial; the amount offered in settlement; the extent of completed discovery and stage of proceedings; the experience and views of counsel and the

reaction of class members to the proposed settlement. (*Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th at p. 1801.)

III. THE SETTLEMENT WAS FAIR

A. The Strength of Plaintiffs' Case

Objectors claim that the rollup was so grossly unfair to the limited partners that it constituted a clear breach of fiduciary duty owed by Glenborough to them. Thus, they conclude their case is strong. Objectors present us with an exhaustive analysis of the minute details of the transaction and the factors considered by the trial court. But they fail to account for the well-developed record below, including substantial evidence from respondents' experts that supports the fairness decision. Under the abuse of discretion test, we employ the equivalent of the substantial evidence test when it comes to accepting the trial court's resolution of credibility and conflicting substantial evidence and choice of reasonable inferences. *In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th 344, 358; see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.

1. The Level 1 Allocation

Objectors first contend the level 1 allocation was unfair because allocation of REIT shares between the limited partners and GC was based on cash flow instead of a fair market valuation of the assets of the respective entities. They point to affidavits of their experts which averred that the cash flow method ignores significant facts such as net asset value and does not adequately account for differing risk levels of the entities' respective

cash flows. Acknowledging the difficulty of valuing the parties' respective interests, the trial court found that the cash flow approach, rather than relative asset valuation, was economically more realistic and the method generally adopted in similar situations.

Objectors disregard respondents' evidence. In particular, Glenborough's expert opined that funds from operation (or cash flow) is one of the most commonly accepted tools for valuing real estate securities. In addition, Blumberg's expert declared that allocation to management companies based on cash flow is an appropriate allocation methodology. Further, a financial and management consultant company (the Stanger firm) that delivered a fairness opinion on aspects of the REIT transaction also declared that the allocation methodology for the rollup "is similar to and produces results consistent with other similar transactions." Moreover, there was evidence that Glenborough discounted its cash flow more heavily than did the limited partnerships. This is because GC received 20.2 percent of shares issued by the REIT while contributing 29.5 percent of the cash flow contributed to the REIT.

Objectors also complain that the method of calculating GC's cash flow improperly relied on the results of a single year (fiscal 1994), a choice biased in favor of Glenborough. The record reveals to the contrary that Glenborough's cash flows were adjusted to exclude extraordinary and nonrecurring transactions, and that the cash flows used for allocation purposes were *less than* the annualized operating cashflow of GC for the six months ending June 30, 1995. Thus, as the Stanger Firm stated, the cash flows actually used were developed with a general bias to the partnerships, not Glenborough, So, too,

there was evidence to refute objectors' contention that Glenborough ignored the limited partnerships' improved cash flow. The prospectus showed that for purposes of level 1 allocations, they received credit for nearly $600,000 more in cash flow than they generated during the base fiscal year, in order to reflect those very improvements.

Objectors also attack the value imputed to GC as vastly overstated. They argue that since GC had a negative book value, it could not possibly have the positive fair market value attributed to it. Again, their position ignores GC's cash flow contribution, since the market values the REIT on its ability to pay cash dividends. The record shows that GC contributed substantial intangible assets to the REIT in the form of revenue streams from long-term management contracts, most of which came from sources outside the participating limited partnerships.

Objectors further contend that the Rancon transaction did not improve matters or affect the allocation of shares at level 1. Again, this is a variation on their argument that Glenborough should have used net asset value rather than cash flow at this level. Objectors also suggest that Glenborough is claiming credit for the assets but not the cost associated with the transaction. But Glenborough did adjust cash flow for both the income and debt. Moreover, it did not purchase the Rancon partnerships – it contracted to have an affiliate that participated in the rollup perform management services for the Rancon partnerships.

2. The Level 2 Allocation

Objectors also charge that the level 2 allocation, which generally apportioned REIT shares among the limited partnerships in proportion to net asset value, was unfair. One of the partnerships, called "GPA" which indirectly owned four warehouse properties, was owned in substantial part by Glenborough. Instead of receiving REIT shares, GPA was to receive units in the operating partnership that held most of the REIT assets.

The assets of the operating partnership consisted of assets net of liabilities contributed by the REIT, and assets net of liabilities contributed by GPA. The liabilities contributed by the REIT included not only the debts of the limited partnerships (already reflected in their net asset value calculations), but also a $13 million debt of GC which it assumed in the rollup. This means that the net asset value contributed by the REIT to the operating partnership was *less* than the net asset value contributed by the limited partnerships to the REIT.

The result is that although GPA represented approximately 10.5 percent of the combined net asset value of all partnerships, it represented 13 percent of the combined net asset value contributed to the operating partnership and thus received a 13 percent interest therein. Objectors claim it is unfair to use cash flow as the basis for level 1 allocation, which imputes a positive value to GC, and then use net asset value, which subsumes GC's debt, to allocate interests in the operating partnerships. This switch in methodologies, they claim, works to GPA's advantage.

As Glenborough points out, however, the REIT itself holds interests in both the operating partnership and other entities (called associated companies) that performed property management for the REIT, as well as properties owned by unrelated third parties. The record reveals that the operating partnership *has no interest in the associated companies.* Thus, as one of Glenborough's experts explained, the shares of the operating partnership are not as valuable as REIT shares because they will not receive any dividends from the associated companies. The minor difference between the percentages of net asset value (10.5 percent) and shares in the operating partnership (13 percent) reflects this value differential.[2]

Objectors also challenge the $8 million net asset value attributed to GPA. Glenborough retained the Stanger firm to appraise the real estate assets of every partnership involved in the rollup, including GPA. Glenborough's evidence is to the effect that this appraisal followed industry norms – site visits, interviews with management, review of rent rolls, collection on market rental rates, rental projections, and use of appropriate capitalization and discount rates. Objectors further hint that because GPA's predecessor instituted voluntary bankruptcy proceedings in 1992, and since GPA's financials were not included in the prospectus, the partnership was not financially sound. But because GPA was not contributing cash flow to the REIT, the income statement was not

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[2] We note that GPA's interest in the operating partnership carried redemption rights which, after a period of at least one year, would entitle GPA to exchange its interest in the operating partnership for REIT shares of equal market value.

germane to the rollup. Further, the predecessor apparently shed liabilities during the bankruptcy reorganization.

Finally, objectors complain that the Stanger firm did not opine on the fairness of the level 2 allocation to the partnerships. The firm did opine that allocation of shares among the eight limited partnerships was fair to the limited partners of those partnerships from a financial point of view. The opinion also stated that allocation of units in the operating partnership between the REIT and GPA was fair to GPA. Objectors are right that Stanger did not opine as to allocation between the partnerships on the one hand and GPA on the other, but to do so would be mixing apples and oranges because the interests – REIT shares and limited partnership units – are different.

3. *Change in Nature of Investment*

Objectors also argue that the settlement was unfair because the rollup changed the status quo, effectively eliminating the prospect of liquidating the partnerships under their original timetables, and instead perpetuating Glenborough's ability to earn management fees.

The trial court found otherwise, noting that the limited partners invested in "highly illiquid" partnerships. The rollup of course rendered the investment more liquid, with REIT shares that can now be publicly traded. Moreover, as Glenborough points out, with the rollup the former limited partners can share in management fees, including those generated from Glenborough's management of the Rancon partnership, and the rollup would

provide greater diversification by type of property for more partners. Moreover, there was evidence that bulk liquidation of partnership assets would result in discounts that would exceed the entire cost of the REIT transaction. And, gradual liquidation would erode the return to investors due to the ongoing costs of administering the partnerships.

4. Benefit to Glenborough

Next objectors argue the court should not have approved the settlement because Glenborough benefited disproportionately from the transaction. They specifically cite liabilities eliminated by the rollup and tax benefits not shared by the limited partners.

$4.3 million in released liabilities represented contingent personal guaranties given by Batinovich on debts of the limited partnerships. The guaranties were given in the first instance to enable the partnerships to obtain loans, and of course they have realized the proceeds and are primarily liable for the debts. An additional $14.3 million of Glenborough's non-real estate debt was assumed by the REIT. But Glenborough offset the interest on this debt against its cash flow contribution for purposes of calculating the allocation of REIT shares. Finally, the potential tax liabilities deferred or eliminated with the rollup were highly speculative.

5. Transaction Costs

Finally, objectors complain that it was unfair to foist at least $2.9 million in transaction costs on the limited

partnerships. This argument overlooks the fact that the costs of the REIT were shared by all participating entities and were lower than costs associated with liquidation.

B. The Relief Offered in the Settlement

The relief offered in settlement is another important factor which the trial court must consider in approving a class action settlement. Objectors claim they received no economic value and that the other purported benefits – additional disclosures and restrictions on selling shares – were illusory. They point to a number of federal decisions where proposed settlements were disapproved in part because class members received no economic value but counsel or named plaintiffs did. (See, for example, *In re General Motors Corp. Pick-up Truck Fuel Tank* (3d Cir. 1995) 55 F.3d 768, 803 [criticized by *Dunk v. Ford Motor Co., supra,* 48 Cal.App.4th at pp. 1803-1804 for *reweighing* the fairness factors]; *Plummer v. Chemical Bank* (2d Cir. 1982) 668 F.2d 654, 660.)

As to the disclosures, objectors first argue that they were not really new because they appeared in previous versions of the prospectus. The record reveals that all were added in late June 1995 at the request of Blumberg's counsel.

The structural changes consisted of provisions designed to limit the downward pressure on the price of REIT stock when issued and to avoid undue future dilution of class members' interests. The first was an extension of the lockup period on REIT shares to be owned by Glenborough management. Although the lockup could be

waived by the REIT, the REIT itself was to be governed by a board of directors with a majority of independent directors. The compensation committee, consisting of three independent directors, would make any recommendations concerning salaries and incentives and would have to approve the waiver.

The remaining restrictions had to do with options to purchase REIT stock. They extended the period prohibiting issuance of any options and set a floor on the option exercise price. These restrictions, which could not be waived by the REIT, were designed as an incentive to keep the REIT stock price at or above the option price.

That the disclosures and transfer limitations were in place before approval of the settlement does not mean they are worthless because the evidence shows they were brought about during the settlement process. Moreover. the absence of monetary relief does not mean the settlement lacked benefit as to the limited partners. (See *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1139 [no fairness problem where monetary relief paltry but primary focus was on prospective relief].)

Finally, the focus on disclosures and structural aspects of the transaction was appropriate given the change in cash flow contributions of Glenborough fostered by the Rancon deal. In fact the record shows that these structures had a beneficial effect because the stock prices during the initial trading staved in a narrow band of approximately 85 percent of the $15 per share exercise price.

C. Discovery and Stage of the Proceedings

Settlement negotiations began early in the proceedings, but it must be remembered that once the SEC declared the registration statement effective, the rollup could close within 60 days. Although there was no formal discovery, there was ample informal documentary discovery to enable class members to make an informed judgment on the strengths and weaknesses of their case. These factors did not militate against approval of the settlement.

D. Experience and Views of Counsel

Blumberg was represented by counsel with significant experience in complex financial transaction litigation, including rollups. Indeed, two of the firms collaborated on a case involving a comparable transaction completed in 1994-1995.

E. The Expense, Risk, Complexity and Likely Duration of Further Litigation

This was a complex case with complex financial issues that would necessitate substantial expert testimony from both sides. The record generated for the settlement process is testimony to this state of affairs. Glenborough denied wrongdoing, and, in the absence of settlement negotiations, would have vigorously defended the rollup.

F. The Risk of Maintaining Class Action Status Through Trial

This factor does not weigh in favor of settlement because it appears Blumberg's counsel thought the action would meet the requirements for class action treatment.

G. Reactions of Class Members

Out of a class of some 18,000, only 13 members objected. Only 6 of the 13 have pursued an appeal. Quite a low level of dissent!

IV. THE SETTLEMENT WAS NOT TAINTED

Objectors also urge that the court should not have approved the settlement because there was evidence that the class attorneys sacrificed the rights of the class for their benefit, citing, *Ficalora v. Lockheed California Co.* (9th Cir. 1985) 751 F.2d 995, 996-997. They point to the fact that pursuant to the settlement agreement, Glenborough agreed not to oppose Blumberg's request for a $5,000 "incentive award" and counsel's request for fees and expenses up to the amount of $850,000. These items were payable by the REIT.

The record shows that there was no discussion of fees or incentives until after the parties reached agreement on the substance of the settlement. Further, the settlement agreement set maximum awards, subject to the trial court's discretion to modify the requested amounts. At the hearing, Blumberg's counsel indicated that the court could approve the settlement and deny the fees, pointing

out that the two issues were independent and negotiated separately per decisional law. Counsel further pointed out that the multiplier was below that recently approved in another injunctive relief settlement. The court in turn examined the requests and found that they were fair and reasonable. Objectors have not appealed the fee or incentive awards. Objectors' contention concerning the fees has no merit.

V. CERTIFICATION OF A MANDATORY CLASS DID NOT VIOLATE OBJECTORS' DUE PROCESS RIGHTS

The trial court certified a settlement class consisting of all persons holding units of limited partnerships as of a certain record date and further ordered that the settlement class was mandatory, thereby precluding members from opting out of the settlement class. Objectors contend that certification of a non-opt-out class violated the due process rights of absent class members. We disagree.

In *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797 (*Shutts*), the United States Supreme Court held that in order to bind absent plaintiffs in a class action for money damages or similar relief, minimal procedural due process protection requires that these plaintiffs be given an opportunity to opt out of the class (*Id.* at pp. 811-812.) The court went on to specifically limit this holding "to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. . . . " (*Id.* at p. 811, fn. 3.)

Objectors rely on *Brown v. Ticor Title Ins. Co.* (9th Cir. 1992) 982 F.2d 386. There, the Ninth Circuit held that in

cases of hybrid suits involving substantial damage claims, minimal due process requires that absent plaintiffs be afforded the opportunity to remove themselves from the class. Accordingly, although plaintiff Brown was bound by the injunctive relief provided by settlement of a class action, because he had no chance to opt out, res judicata would not bar his claim for monetary damages.[3] (*Id.* at p. 392.)

Respondents rely on *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589 (*Bell*). One question presented was whether the granting of settling defendant's request to preclude opt outs from the class violated plaintiffs' due process rights. The court concluded *Shutts*, by its terms, did not compel a due process right to opt out of the class action. Unlike *Shutts*, the suit in question sought both equitable and monetary relief and thus it was within the trial court's discretion to find the case was not predominantly for monetary relief. The *Bell* court further noted

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[3] The Supreme Court granted certiorari to review the Ninth Circuit's decision. The question presented was whether a federal court could refuse to enforce a properly certified prior federal class action judgment on the ground that absent class members have a due process right to opt out of any class asserting monetary claims on their behalf. (*Ticor Title Ins. v. Brown* (1994) 511 U.S. 117.) However, a *per curiam* court dismissed the writ as improvidently granted based on very convoluted reasoning concerning the possibility of a nonconstitutional ground for decision that nonetheless was not available to the parties. (*Id.* at pp. 120-121.) Objectors characterize this opinion as confirming that *Brown* extends an opt-out right where class action settlement forecloses substantial damage claims. All the court did was characterize the contention that the Ninth Circuit accepted; it neither confirmed nor disapproved of the contention.

that cases which had addressed the effect of *Shutts* on mandatory classes under Federal Rules of Civil Procedure,[4] rule 23(b)(1) and (b)(2) (28 U.S.C.) determined there is no due process opt out for such classes. (*Bell, supra,* 226 Cal.App.3d at pp. 1609-1610.) The *Bell* court concluded it was within the trial court's discretion to treat the action as falling within the scope of rule

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[4] All further references to rules are to the Federal Rules of Civil Procedure.

Rule 23 establishes three types of class actions. In subdivision (b)(1) and (b)(2) classes, there is no right to opt out, while with subdivision (b)(3) actions, class members are entitled to individual notice of the right to opt out of the class. (Rule 23(c)(2).)

Rule 23(b)(1) pertains where "the prosecution of separate actions by or against individual members of the class would create a risk of [¶](A) inconsistent or varying, adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or [¶](B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . . "

Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . . "

Finally, rule 23(b)(3) applies where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and the class action device "is superior to other available methods for the fair and efficient adjudication of the controversy. . . . "

23(b)(1)(A) or (b)(2), and that such treatment was consistent with the general rule favoring certification under (b)(1) and (b)(2) in order to assure the res judicata effect of the judgment. (*Bell, supra* 226 Cal.App.3d at pp. 1604-1605, 1608.) And, rule 23(b)(2) cases are not limited to actions requesting only injunctive or declaratory relief; they may also include requests for money damages, so long as the final relief does not relate predominantly to money damages. (*Bell, supra,* at p. 1605.)

Here, the trial court certified the settlement class pursuant to Code of Civil Procedure section 382 and rule 23(b)(1) and (b)(2).[5] This was appropriate. First, there was a likelihood of separate actions and, in fact, shortly after the court entered its preliminary order a separate action challenging the rollup was filed in federal court. At the time of certification, there was thus a risk of inconsistent adjudications which could create potential conflicts for Glenborough, e.g., concerning required disclosures in the prospectus which would have to be disseminated class-wide, allocation of REIT shares, etc.[6] Second, Glenborough's action in proposing the rollup constituted a common course of conduct toward all holders of limited

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[5] Our Supreme Court has directed state courts to follow rule 23 whenever California authority is lacking. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453.) As noted in *Bell,* Code of Civil Procedure section 382 does not address when the trial court should afford an opt out right. (*Bell, supra,* 226 Cal.App.3d at p. 1603.)

[6] Objectors argue that since the rollup has already occurred, the possibility of conflicting adjudications on equitable grounds is moot. However, at the time the court certified the class, the rollup was not a done deal.

partnership interests and the class action sought corresponding equitable and declaratory relief to stop or rescind the rollup.

By affording the class rule 23(b)(2) status, the trial court implicitly found that the action was primarily for equitable relief. (See *Bell, supra,* 226 Cal.App.3d at p. 1606.) The complaint itself sought to enjoin consummation of the rollup, or, if the rollup closed, to rescind it absent a fair market evaluation of GC's assets. It further asked for an accounting and for compensatory damages. The settlement itself provided for nonmonetary relief. Of course damage claims were extinguished, but so, too was the right to hold up the rollup! The court did not abuse its broad discretion in implicitly deciding that equitable relief predominated.[7]

Objectors argue nonetheless that respondents are "judicially estopped" from pressing that this case is not predominantly for monetary relief, because counsel for Glenborough argued in the federal case that damages

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[7] Objectors contend that no such finding, was made, nor could it be made because respondents simply presented the court with an ex parte order granting preliminary approval of the proposed settlement, which included a clause certifying a mandatory class. The preliminary order also certified the class under rule 23(b)(2), which, pursuant to *Bell,* includes the implicit finding that equitable relief predominates. At that time the court had before it the complaint and the proposed settlement. Following the preliminary order, 13 class members came forward and argued against the settlement, some objecting to the no opt out provision. Thus by the time of final approval of the settlement, the court had the benefit of argument from both sides on the matter. Further, the issue of a mandatory class was argued at the hearing.

were the thrust of that action. We are not sure what point objectors are making. First, counsel's argument is not an admission or stipulation, judicial or otherwise. Second, the matter they reference was the hearing on the request of BEJ Equity Partners[8] for a temporary restraining order and injunctive relief! Of course counsel was arguing *against* the granting of this extraordinary remedy of injunctive relief, emphasizing the availability of a damages remedy instead. And, in any event counsel's argument does not establish the nature of the action.

Objectors further urge that *Bell* does not control because it predates the Ninth Circuit's opinion in *Brown*. While federal circuit court precedent on issues of federal law is entitled to substantial deference, it is not binding. (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 349, 1351.) We find *Brown* unpersuasive to the extent it attempts to establish something other than the predominance test announced in *Shutts*. *Bell* says that *Shutts* applies when the class action is predominantly for monetary relief. In hybrid cases where the claim for monetary relief does not predominate over claims for injunctive and declaratory relief, due process is satisfied *without* the opt out right where objectors are adequately represented by named plaintiffs; represented by a qualified attorney – provided with notice of the proposed settlement; given an opportunity to object; and assured that settlement will not go forward unless the trial court determines it to be fair, adequate and reasonable. (*Bell, supra,* 226 Cal.App.3d at

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[8] BEJ Equity Partners was a holder of limited partnership units and one of the 13 class members who initially objected to the class settlement.

p. 1589.) All these elements ensuring due process were present in this case.

VI. PRELIMINARY APPROVAL OF THE SETTLEMENT

Objectors finally maintain that "preliminary approval of the settlement" was improper, thereby rendering final approval an abuse of discretion. They brief three points. First, they assert the trial court violated its local rules by certifying the settlement class on an ex parte application rather than by noticed motion. Any error was harmless. All class members received notice of the fairness hearing and had an opportunity to submit opposition and address the merits of the settlement. No prejudice attaches to the purported procedural irregularity because the hearing on the trial court's final approval was fair.

Second, objectors contend the trial court ignored Code of Civil Procedure sections 527 and 529 by issuing a preliminary injunction prohibiting class members from filing other suits without requiring the applicant to provide notice, to file a verified complaint or affidavit, or post a bond. Objectors argue that the preliminary injunction was not harmless error because it "handcuffed" the limited partners from bringing a separate action in superior court and presenting their own "motion" to enjoin the rollup. Realistically, any such action or motion most likely would have been coordinated with the Blumberg action. And, we are talking about a very narrow window of opportunity – approximately three months from the court's preliminary order and the fairness hearing. Moreover, BEJ Equity Partners did commence an action in

federal court prior to the fairness hearing. Again, since the trial court here ultimately concluded that the settlement, including its injunctive provisions, was fair, no prejudice attached to the purported procedural lapse.

Third, objectors assert that at the time respondents initially sought approval of the settlement, it misrepresented the nature of the benefits to be derived therefrom. In both examples cited by objectors, time periods relating to restrictions on the sale of stock and issuance of options were extended for the benefit of the limited partners. The settlement agreement describes these benefits without mentioning that Glenborough had already agreed to lesser periods.

Objectors make this out to be an intentional omission. To begin with, we do not know what was discussed at the ex parte hearing requesting preliminary approval. Moreover, since objectors fully participated in opposition to final approval, we fail to see any harm coming from this alleged misrepresentation.

We affirm the judgment.

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Reardon, J.

We concur:

_____

Hanlon, P.J.

_____

McGuiness, J.

First Appellate District, Division Four, No. A075278
S069109

IN THE SUPREME COURT OF CALIFORNIA

DONALD BARNETT Et Al., Appellants

v.

GENBOROUGH REALTY CORPORATION Et Al., Responents

ANTHONY BLUMBERG, Respondent

(Filed May 20, 1998)

Petition for review DENIED.

GEORGE
Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

ANTHONY E. BLUMBERG, et al.,	No. 391223
Plaintiff,	CLASS ACTION
v.	(Filed Oct. 11, 1995)
GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, and ROBERT BATINOVICH, et al.,	
Defendants.	

ORDER CERTIFYING SETTLEMENT CLASS, APPROVING NOTICE OF PROPOSED SETTLEMENT, AND SETTING SETTLEMENT HEARING

The Court has received the Class Action Settlement Agreement, dated as of October 9, 1995, that has been entered into by the Class Representative and the Defendants. The Court has reviewed the Agreement and its attached exhibits, and, good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Court, for purposes of this order, adopts the definitions set forth in paragraphs 2.1 through 2.23 of the Agreement.

The Court approves the settlement of the Action set forth in the Agreement as falling within the range of

possible approval and meriting submission to the Settlement Class for consideration, pursuant to California law and Rule 23(e) of the Federal Rules of Civil Procedure.

3. The Court hereby certifies the Settlement Class consisting of all persons who hold units of the Limited Partnerships as of the record date set forth in the Prospectus, pursuant to California Code of Civil Procedure Section 382 and Federal Rule of Civil Procedure 23, subdivisions (b)(1) and (b)(2). Excluded from the Settlement Class are Defendants, their officers and directors, members of their immediate families, entities in which any of the Defendants has a controlling interest, and the legal representatives, heirs, successors, predecessors in interest or assigns of any of the Defendants. The Court appoints Anthony E. Blumberg as representative of the Settlement Class. The Court further appoints the law firms of Chimicles, Jacobsen & Tikellis and Krislov & Associates, Ltd. as counsel for the Settlement Class. The certification of the Settlement Class, and the appointments of the Class Representative and Class Counsel, shall be binding only with respect to the settlement of the Action. In the event the Agreement is terminated or the Effective Date for any reason does not occur, the certification of the Settlement Class and appointments of the Class Representative and Class Counsel shall automatically be vacated, and the Action shall proceed as though the Settlement Class had never been certified.

4. The Court approves the Notice of Proposed Settlement and Settlement Hearing for distribution to the Settlement Class substantially in the form of Exhibit A to this order.

5. Defendants shall send by first class mail the Notice of Proposed Settlement to all Settlement Class Members on or before November 15, 1995. Defendants shall file with the Court and serve upon Class Counsel no later than 10 days prior to the Settlement Hearing an affidavit or declaration stating that the mailings have been completed in accordance with the terms of this order. The REIT shall bear the costs of mailing the Notice of Proposed Settlement to Settlement Class Members.

6. The Court finds that dissemination of the Notice of Proposed Settlement in the manner required by paragraph 5 of this order constitutes the best notice practicable under the circumstances to all Settlement Class Members, and complies fully with California law, Rule 23(e) of the Federal Rules of Civil Procedure, and the United States Constitution.

7. A Settlement Hearing will be held on December 21 1995 at 9:00 a.m. at which time the Court will determine (1) whether the settlement of the Action should be approved as fair, reasonable and adequate; (2) whether the application of Class Counsel for an award of attorneys' fees, costs, and expenses and for an incentive award to the Class Representative should be approved. The Court may adjourn or continue the Settlement Hearing without further notice to the Settlement Class.

8. Any Settlement Class Member who objects to the settlement of the Action, or the application of Class Counsel for attorneys' fees, costs, and expenses, or for an incentive award to the Class Representative, shall have a right to appear and be heard at the Settlement Hearing. Any such person must file with the Court and deliver to

Class Counsel a written notice of objection postmarked on or before December 14, 1995. The manner by which a notice of objection should be prepared, filed and delivered shall be stated in the Notice of Proposed Settlement. Only Settlement Class members who have filed and delivered valid and timely written notices of objection will be entitled to be heard at the Settlement Hearing, unless the Court otherwise so orders. Class Counsel shall provide copies of any and all such notices of objections to Counsel for Defendants at least ten days before the Settlement Hearing.

9. Class Counsel shall submit any application they wish to make for attorneys' fees, costs, and expenses and application for incentive award to the Court on or before December 1, 1995.

10. All briefs supporting or opposing the settlement shall be served and filed not less than 7 days prior to the Settlement Hearing.

11. All discovery and other proceedings in the Action are stayed until such further order of the Court, except as may be necessary to implement the settlement of the Action or comply with the terms of the Agreement. The Class Representative and the Settlement Class Members are barred from commencing or prosecuting any direct or representative action asserting any of the Settled Class Claims, unless and until the Agreement is terminated according to its terms.

12. The Court may, for good cause, extend any of the deadlines set forth in this order without further notice to the Settlement Class. Class Counsel shall, however,

notify all parties, Counsel for Defendants and any Settlement Class Member who has indicated an objection to settlement of the Action, of any extension of any deadline ordered by the Court.

13. The Settlement Class is mandatory. Settlement Class members are precluded from excluding themselves from the Final Judgment or from opting out of the Settlement Class.

Dated: October 11, 1995 /s/ Walter Harrington
California Superior
Court Judge

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

ANTHONY E. BLUMBERG, et al., Plaintiff, v. GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, and ROBERT BATINOVICH, et al., Defendants.	No. 391223 CLASS ACTION

NOTICE OF PROPOSED SETTLEMENT AND SETTLEMENT HEARING

TO: ALL PERSONS AND ENTITIES WHO WERE UNIT HOLDERS OF RECORD OF LIMITED PARTNERSHIP UNITS IN ANY OF THE FOLLOWING LIMITED PARTNERSHIPS AS OF OCTOBER ___, 1995:

- EQUITEC INCOME REAL ESTATE INVESTORS B;
- EQUITEC INCOME REAL ESTATE INVESTORS C:
- EQUITEC INCOME REAL ESTATE INVESTORS – EQUITY FUND 4
- EQUITEC MORTGAGE FUND IV;
- EQUITEC 79 REAL ESTATE INVESTORS;
- OUTLOOK PROPERTIES FUND IV;
- GLENBOROUGH ALL SUITE HOTELS L.P.;
- GLENBOROUGH PENSION INVESTORS.

PLEASE READ THIS NOTICE CAREFULLY. YOUR RIGHTS WILL BE AFFECTED BY THE PROCEEDINGS IN THIS LITIGATION. THIS NOTICE RELATES TO A PROPOSED SETTLEMENT OF THE LITIGATION REFERRED TO IN THE CAPTION. THE PROPOSED SETTLEMENT CONCERNS BENEFITS TO THE PARTNERSHIPS, WHICH ARE DESCRIBED MORE FULLY BELOW. IF THE COURT APPROVES THE PROPOSED SETTLEMENT, YOU MAY BE FOREVER BARRED FROM CONTESTING THE FAIRNESS, REASONABLENESS OR ADEQUACY OF THE PROPOSED SETTLEMENT OR FROM PURSUING THE SETTLED CLAIMS AGAINST THE DEFENDANTS.

1. This Notice is given pursuant to the California Code of Civil Procedure, Rule 23(e) of the Federal Rules of Civil Procedure and an order of the California Superior Court for the County of San Mateo (the "Court") dated October ___, 1995 (the "Preliminary Order"), entered in the above-entitled action (the "Action"), to notify you of the pendency of the Action, the proposed settlement of the Action, the Court's certification of the class for purposes of this settlement, of a settlement hearing (the "Settlement Hearing") and your rights with respect to the foregoing.

2. The Settlement Hearing will be held on ___ 1995, at _____9:00 a.m. in Department ___ of the San Mateo County Superior Court, at the State of California Superior Courthouse, 401 Marshall Street, Redwood City, California, 94603. The purpose of the hearing is to determine (1) whether the settlement of the Action should be approved as fair, reasonable and adequate; and (2) whether the application of the settlement class's counsel for attorneys'

fees, costs, and expenses and for an incentive award to the class representative should be approved.

3. This Notice is not intended to be, and should not be construed as, an expression of any opinion by this Court with respect to the truth of the allegations in the Action or the merits of the claims or defenses asserted. The purpose of this Notice is to advise you of the proposed settlement of the Action and your rights with regard to it. The factual statements herein are based on information provided to the Court by counsel for the parties and do not constitute findings of the Court.

BACKGROUND AND NATURE OF THE LITIGATION

4. On September 1, 1994, Glenborough Realty Corporation and Robert Batinovich filed a registration statement on Form S-4 with the Securities and Exchange Commission. The registration statement described a proposed consolidation (the "Consolidation") by merger of Glenborough Corporation and up to eight real estate partnerships (the "Limited Partnerships"), and the formation of a new corporation known as Glenborough Realty Trust Incorporated (the "REIT").

5. The eight Limited Partnerships included in the proposed Consolidation were Equitec Income Real Estate Investors B, Equitec Income Real Estate Investors C, Equitec Income Real Estate Investors – Equity Fund 4, Equitec Mortgage Investors Fund IV, Equitec 79 Real Estate Investors, Outlook Properties Fund IV, Glenborough All Suite Hotels, L.P., and Glenborough Pension Investors.

6. On September 2, 1994, Glenborough Realty Corporation and Robert Batinovich filed Pre-Effective Amendment No. 1 to the Registration Statement. Pre-Effective Amendment No. 2 to the Registration Statement was filed with the Securities and Exchange Commission on January 4, 1995.

7. On February 21, 1995, Anthony E. Blumberg ("Plaintiff") commenced the Action against Glenborough Realty Corporation, Glenborough Corporation, and Robert Batinovich ("Defendants") entitled *Blumberg v. Glenborough Realty Corporation, et al.*, Case No. 391223 (Cal. Super. Ct.). The Action was filed on behalf of a putative class comprised of unit holders of the Limited Partnerships that were the subject of the proposed Consolidation (the "Settlement Class"), and charged the Defendants with breaches of fiduciary duty and breaches of the duty of good faith and fair dealing. The Action prayed for equitable relief, preliminary and permanent injunctive relief, and compensatory damages.

8. The Action alleged that the registration statement filed on form S-4 with the Securities and Exchange Commission on September 1, 1994, together with all of its amendments, including the prospectus and associated consent solicitation materials disseminated concurrently with this Notice pursuant to the Consolidation (the "Prospectus") (collectively, the "Registration Statement"), were false and misleading, and designed to coerce the approval of the Consolidation. According to the Action, the Registration Statement and Prospectus failed adequately to disclose the terms and risks of the Consolidation, and also misrepresented the fairness of the

Consolidation to Settlement Class Members, all in breach of Defendants' fiduciary duties.

9. The Action also alleged that (1) the proposed Consolidation, if completed, would have the effect of unfairly entrenching management and depriving the Settlement Class Members of the opportunity to maximize investment returns, and (2) the terms of the Consolidation were unfair to the Settlement Class Members, based in part on the Action's allegation that the Consolidation assigned an arbitrary and excessive valuation to Glenborough Corporation, which was determined without an appraisal of its business or assets. Based upon these allegations, the Action further alleged that the owners of Glenborough Corporation would obtain an excessively high allocation of shares in the REIT under the terms of the Consolidation.

10. On June 26, 1995, Pre-Effective Amendment No. 3 to the Registration Statement was filed with the Securities and Exchange Commission. The Registration Statement, as amended, included the additional disclosures and terms requested by Class Counsel.

11. On September 1, 1995, Glenborough Realty Corporation and Robert Batinovich filed Pre-Effective Amendment No. 4 to the Registration Statement. Additional amendments to the Registration Statement may be filed in the future. In addition, on or before October 15, 1995, Glenborough Realty Corporation and Robert Batinovich intend to distribute the Prospectus to the Settlement Class Members. The additional amendments to the Registration Statement, and the Prospectus, included

and will include the additional disclosures and terms requested by Class Counsel.

12. A written Class Action Settlement Agreement (the "Agreement") dated as of October ___, 1995, was entered into by the Class Representative and the Defendants.

PLAINTIFF'S INVESTIGATION, DISCOVERY AND THE PARTIES' DECISION TO SETTLE

13. Class Counsel have made a thorough investigation of the Consolidation and the facts and circumstances surrounding the allegations made in the Action. They have reviewed and analyzed the Registration Statement and Prospectus, publicly available information, and thousands of pages of documents produced by Defendants. They have also performed extensive analyses of the relative cash flows of Glenborough Corporation and the Limited Partnerships, investigated comparable transactions, consulted with an expert witness, and investigated the law applicable to their claims and to the defenses raised by Defendants.

14. Class Counsel have concluded that it is in the best interests of the Class Representative and Settlement Class Members that the Action be settled on the terms and conditions set forth in the Agreement. Based on the terms of the proposed Consolidation, as disclosed in the Registration Statement, Class Counsel believe that the Agreement is fair, reasonable, and adequate, and that the Consolidation is within the range of reasonableness for the Settlement Class Members. Class Counsel have

reached these conclusions after considering the disclosures made in the Registration Statement and Prospectus (including the additional and improved disclosures set out in paragraph 19), all of the terms of the Consolidation (including the additional restrictions on stock sales and options set out in paragraph 20), the financial assumptions underlying the Consolidation, the fact that Defendants decided not to change the Level I allocation of stock in the REIT notwithstanding a substantial increase in Glenborough Corporation's contribution to cash flow from the amount set forth in Pre-Effective Amendment No. 2, the facts and circumstances surrounding the allegations made in the Action, the risks and uncertainties of continued litigation, the expense that would be necessary to prosecute the Action through trial and through any appeals that might be taken, and the likelihood of success at trial.

15. Defendants have indicated their intent vigorously to contest each and every claim underlying the Action. Defendants have consistently maintained that they acted in accordance with governing laws at all times, that the Consolidation as originally proposed was fair to the Limited Partnerships and all limited partners, and that the Registration Statement fairly and adequately described and disclosed the terms of the Consolidation.

16. Defendants have concluded that it is in their best interests that the Action be settled on the terms and conditions set forth in the Agreement. Defendants reached that conclusion after considering the risks and uncertainties of continued litigation, the substantial benefits to the Defendants of a final resolution of the Action, the effort and expense that would be necessary to defend

the Action through discovery, trial, and any appeals that might be taken, the benefits of disposing of protracted complex litigation, and the desire of Defendants to go forward with the Consolidation unhampered by the distractions of continued litigation.

SETTLEMENT OF THE ACTION

17. The following description of the Agreement is only a summary. Reference may be made to the text of the Agreement, on file with the Court, for a full statement of its provisions.

Order Certifying Class for Settlement Purposes Only

18. On October ___, 1995, the Court certified the Settlement Class for purposes of the proposed settlement of the Action only. The Settlement Class is composed of all persons who hold units of the Limited Partnerships as of the record date set forth in the Prospectus. Excluded from the Settlement Class are the Defendants, their officers and directors, members of their immediate families, entities in which any of the Defendants has a controlling interest, and the legal representatives, heirs, successors, predecessors in interest or assigns of the Defendants. The Court also appointed Anthony E. Blumberg as representative for the class ("Class Representative") and designated the law firms of Chimicles, Jacobsen & Tikellis and Krislov & Associates, Ltd. as counsel for the Settlement Class ("Class Counsel").

Terms of Settlement

19. At Class Counsel's request, the Registration Statement and Prospectus to be distributed to Settlement Class Members contain certain additional disclosures concerning the proposed Consolidation. The additional disclosures are to the effect that:

(i) The relatively small size of the REIT, in terms of equity capitalization, could tend to depress the market value of the shares by comparison to real estate investment trusts with larger equity capitalization. (Pre-Effective Amendment No. 4, page 28.)

(ii) In January 1994, Glenborough Corporation acquired the right to manage eight limited partnerships previously managed by Rancon Corporation. Glenborough Corporation's total purchase price for Rancon's management interests was $6,994,250. In addition, Glenborough Corporation agreed to pay Rancon $1,830,000 to acquire real estate from Rancon Current Yield 12+ and $270,000 to acquire real estate from Rancon and Rancon Palomar View Estates L.P. In addition, Glenborough Corporation incurred $508,338 in fees and costs associated with these transactions. Approximately $3.9 million of these obligations will be assumed by the REIT. (Pre-Effective Amendment No. 4, pages 322-23.)

(iii) It is possible that Glenborough Corporation's management income could decline in the event one or more of the Rancon-related partnerships were to liquidate or become insolvent. (Pre-Effective Amendment No. 4, page 33.) In addition, the most recent financial audit of Rancon Development Fund VI states that the financial statements were prepared "assuming that . . . Fund

VI . . . will continue as a going concern." (Pre-Effective Amendment No. 4, page 322.)

(iv) There is no separate appraisal of Glenborough Corporation's business or assets. In the event the market value of the REIT's shares declines after the Consolidation, the potential adverse impact of the possible overvaluation or decline in value of Glenborough Corporation could be greater as a result of Glenborough Corporation's debt assumed by the REIT than if Glenborough Corporation were debt-free. In addition, the valuation of Glenborough Corporation for purposes of the Consolidation may be higher than if Glenborough Corporation were to sell its management business in a transaction with an unaffiliated third party. (Pre-Effective Amendment No. 4, page 30.)

20. At Class Counsel's request, the Registration Statement and Prospectus to be distributed to Settlement Class Members contain certain restrictions on the sale of stock and the granting of stock options following the Consolidation, which are intended to enhance the post-Consolidation value of the shares. These restrictions are to the effect that:

(i) Robert Batinovich and the attributed owners have agreed not to sell any of their shares of common stock for two years after the completion of the Consolidation. (Pre-Effective Amendment No. 4, page 355.)

(ii) No options will be granted under the incentive plan until 90 days after the consummation of the Consolidation. (Pre-Effective Amendment No. 4, page 213.)

(iii) No options will be granted by the REIT for an exercise price of less than $15 per share of common stock prior to the expiration of one year after the consummation of the Consolidation. (Pre-Effective Amendment No. 4, page 213.)

MANDATORY NATURE OF SETTLEMENT

21. The Settlement Class is mandatory. Settlement Class Members are precluded from excluding themselves from the Final Judgment, as described below, and may not opt out of the Settlement Class.

FINAL JUDGMENT, RELEASES AND DISMISSALS

22. The proposed settlement is conditioned on, among other things, entry by the Court of a Final Judgment and Order approving the settlement and the terms of the Agreement as fair, reasonable and adequate to the members of the Settlement Class. Under the terms of the Final Judgment and Order that will be proposed, the Court will permanently bar and enjoin the Class Representative and all Settlement Class Members from instituting or prosecuting, in any capacity, any action or proceeding that involves or asserts any of the Settled Claims, as defined in paragraph 24, below.

23. The Final Judgment will dismiss the Action, and all claims in it, on the merits and with prejudice as to the Class Representative and the Settlement Class. It will provide that neither the Final Judgment, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be referred to, offered as

evidence, or received in evidence in any pending or future civil, criminal, or administrative action or proceeding, except in a proceeding to enforce the Final Judgment, or to defend against the assertion of the Settled Claims, or as otherwise required by law.

24. The Final Judgment will also provide that the Settlement Class members shall be deemed to have released and forever discharged the Defendants, and each of their respective present and former employees, officers, directors, partners, participating principals, agents, attorneys, legal representatives, spouses, heirs, assigns, all other persons related to or affiliated with any of them, and all other persons from all claims, rights, demands, causes of action, liabilities, and suits of any kind whatsoever, whether known or unknown, that have been, could have been, or in the future might be asserted based upon, arising out of, or in any way relating to: (1) the Consolidation; (2) the acquisition by any Settlement Class Member of any shares of the REIT pursuant to the Consolidation; (3) any act, failure to act, omission, misrepresentation, fact, event, transaction, occurrence, or other matter alleged, or which could have been alleged, in the Action; (4) any omission or misrepresentation in the Prospectus or Registration Statement; or (5) the subject matter of the Action (the "Settled Claims").

ATTORNEYS' FEES AND EXPENSES

25. Class Counsel have indicated that they will apply to the Court for an award of attorneys' fees, costs, and expenses against the REIT of up to $850,000, based upon the benefit conferred on Settlement Class Members

by the Action. Class Counsel have also indicated that they will apply to the Court for an incentive award, payable to the Class Representative by the REIT, of $5,000.

26. Defendants, in recognition of the benefit conferred by the Action, have agreed not to oppose a request by Class Counsel for attorneys' fees, costs, and expenses, and for an incentive award to the Class Representative made in compliance with the Agreement. Defendants have further agreed that the REIT will pay any award of attorneys' fees, costs, and expenses that may be made by the Court, up to the amount of $850,000. The REIT will also pay any incentive award to Class Representative that may be made by the Court, up to the amount of $5,000.

CONDITIONS OF SETTLEMENT

27. The settlement of the Action is contingent upon, among other things, the occurrence of a number of events, including: (i) entry by the Court of the Final Judgment; (ii) expiration of the time to appeal from the Final Judgment; (iii) if any appeal is taken from the Final Judgment, either dismissal of the appeal or affirmance of the Final Judgment; (iv) if a ruling or decision is entered by an appellate court with respect to the Final Judgment, expiration of the time to petition for a writ of certiorari with respect to the ruling or decision; (v) if a petition for a writ of certiorari with respect to a ruling or decision by an appellate court with respect to the Final Judgment is filed, denial or dismissal of the petition or if the petition is granted, affirmance of the Final Judgment; (vi) the complete consummation of the Consolidation on the

terms and subject to the conditions set forth in the Prospectus and Registration Statement.

28. These conditions may be subject to waiver. Nonetheless, if for any reason, any of these conditions are not met, the Settlement Agreement may be terminated, and if terminated, will have no further force or effect and the Action will proceed as though the Agreement had never been signed.

THE RIGHT TO BE HEARD AT THE SETTLEMENT HEARING

29. Any Settlement Class member who objects to any aspect of the settlement of the Action or Class Counsel's application for fees, costs and expenses or the application for the incentive award to the Class Representative has a right to appear and be heard at the Settlement Hearing.

30. However, unless the Court in its discretion otherwise directs, members of the Settlement Class, and all others (excluding the parties), shall not be heard or be entitled to oppose the approval of the terms and conditions of the settlement or (if approved) the judgment to be entered thereon, or the allowance of fees and expenses to Class Counsel, or the allowance of an incentive award to the Class Representative, and no papers, briefs, pleadings or other documents submitted by any member of the Settlement Class, or any other person (excluding the parties) shall be received and considered, except by order of the Court for good cause shown, unless, no later than _____, 1995, 15 days prior to the Settlement Hearing,

such person has served and filed the following documents in the manner – provided below:

(a) A Notice of Intention to Appear; and

(b) A detailed statement of such person's specific objections to any matter before the Court, the grounds for such objections and any reasons why such person desires to appear and to be heard, and enclosing all documents and writings that such person desires the Court to consider.

31. Such documents shall be filed with the Court at the address noted in paragraph 2 above and served by first class mail upon the following counsel:

Clinton A. Krislov, Esq.
Krislov & Associates, Ltd.
222 North La Salle Street, Suite 810
Chicago, IL 60601-1086

-or-

James R. Malone
Chimicles, Jacobsen & Tikellis
361 West Lancaster Avenue
Haverford, PA 19041
Class Counsel

32. Any person who fails to object in the manner provided herein shall be deemed to have waived his, her, or its objections and shall forever be barred from making any such objections in this Action or in any other related action or proceeding.

NOTICE TO PERSONS OR ENTITIES HOLDING OWNERSHIP ON BEHALF OF OTHERS

33. Brokerage firms, banks or other persons or entities who are current holders for the benefit of others of limited partnership units in the Limited Partnerships are directed to send this notice promptly to all such beneficial owners. In the alternative, record holders may forward the names and addresses of the Settlement Class members and beneficial owners to Defendants, who in turn will send this Notice to such persons or entities.

SCOPE OF THIS NOTICE AND FURTHER INFORMATION

34. This Notice does not purport to be a complete description of the Action, the Preliminary order, the Settlement Agreement or the other matters described herein. For more complete information concerning the Action and the proposed settlement, you may inspect the pleadings, the Agreement and other papers and documents filed with the Court in connection with the Action, during normal business hours, at the office of the Clerk of the California State Superior Court, 401 Marshall Street, Redwood City, California 94603.

35. Questions or communications concerning this Settlement may be directed to Class Counsel. Class Counsel may be contacted as follows: Clinton A. Krislov, Esq., Krislov & Associates, Ltd. 222 North La Salle Street, Suite 810, Chicago, IL 60601-1086, (312) 606-0500 or James R. Malone, Esq., Chimicles, Jacobsen & Tikellis, 361 West

Lancaster Avenue, Haverford, PA 19041, (610) 642-8500. Please do not call the Court.

Clerk of the California Superior Court
San Mateo County

SUPERIOR AND MUNICIPAL COURTS OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

ANTHONY BLUMBERG,
Plaintiff,
VS.
GLENBOROUGH REALTY,
Defendant.
_____/

No. 391223

DECISION

(Filed Jun. 4, 1996)

Submitted: Heard 1/17/96; resubmitted 3/7/96, upon filing of the last of Supplemental Points and Authorities Re *Matsushita Electrical Industrial vs. Epstein*, U. S. Supreme Court 2/27/96 Decision.

DECISION

1. Plaintiff's Motion for Final Approval of Class Action Settlement is granted, the Court finding that the settlement is fundamentally fair, adequate and reasonable to the respective parties to the settlement.

This is an action filed by Plaintiffs to challenge the consolidation or "roll-up" of eight real estate limited partnerships, into a publicly-traded Real Estate Investment Trust, (the Glenborough Realty Trust). The terms of the proposed roll-up are contained in an S-4 registration statement filed with the SEC on September 1, 1994, and twice amended, September 2, 1994, and January 4, 1995. Defendants Robert, Batinovich and Glenborough Realty are the general partners of the partnerships.

The action was brought by Plaintiffs on behalf of the class of 13,000 limited partnerships of the various partnerships involved in this particular roll-up and was challenged on a number of bases.

Under the terms of the roll-up, limited partners of the partnership are to surrender their interest in the partnerships for shares of the common stock of the REIT, and Defendants Robert, Batinovich and Glenborough Realty will also receive shares in exchange for contributing the Glenborough Corporation, and assorted other businesses and interests, including the interests as general partner in the various limited partnerships. The allocation of shares, it was proposed, should be 79.76% to the limited partners, and 20.24% to the general partners.

The Plaintiff and Glenborough engaged in negotiations, and certain modifications were made, reflected in the post-effective Amendment No. 1 to form S4, filed with Security Exchange Commission on October 26, 1995, by requiring additional disclosures and imposing certain restrictions on the sale of the general partner's stock for a period of two years and also imposing certain restrictions on management incentive options, and the exercise of such options.

Objections to the proposed settlement were filed by class members Barnett, Gold, Chaney, Mitchell and Buickerood on various grounds and raising a number of objections, both to the "roll-up" itself as well as to the attorney's fees sought by Plaintiffs for their efforts in renegotiating the terms of the roll-up.

The matter came before the Federal District Court in January, 1996, where the objectors' request for an injunction restraining the implementation of the roll-up was denied.

After the submission of the matter in January, the U. S. Supreme Court decided the Matsushita case, cited above, which case in essence, held that the State Courts do have the power to approve such settlements even though the effect of such approval would be to bar further litigation by the members of the class, not opting Out, under Federal Law, thereby reversing a contrary ruling by the 9th Circuit Court of Appeal.

In the final analysis, the objectors are taking issue with the equity allocation as between the limited partners and the general partners. In the respective memoranda and briefs submitted, and during oral argument, it is very clear that it is not an easy task to value the respective interests of the limited vs. general partners. The limited partners, classically, have invested in a highly illiquid partnership, with the hope of profit and a risk of loss, but with the advantages of limited liability as limited partners, and income tax benefits. The general partners, on the other hand, have the benefit of management fees but are also generally liable for the partnership debts. The Plaintiffs have demonstrated in their support of their request for approval, that their approach of cash-flow valuation, rather than relative asset valuation, is economically more realistic and is the one that is generally adopted in similar situations.

Accordingly, and considering the benefits conferred on the settling class members by the settlement, and the

risks faced by the settlement class members of establishing liability, causation and damages, and the likely probable duration and further expense of the likely burdensome and protracted litigation in the absence of settlement, the Court does approve the settlement, finds it was entered in good faith, and makes its judgment to that effect.

2. Attorney's fees. The Court has examined the request for attorney's fees submitted by counsel for the Plaintiffs, and finds that the total of attorney's fees sought by counsel for the Plaintiffs, together with costs, is fair and reasonable and should be awarded in the approximate sum of $850,000.00, plus $5,000.00 in incentive fees.

DATED: JUN – 4 1996

/s/ Walter H. Harrington
Walter H. Harrington, Jr., Judge